

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

SP 60-900-500
11-5-64
(3)

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,252

POTOMAC ELECTRIC POWER COMPANY, *Appellant*

v.

JOHN F. WYNN, JR., *Appellee*

Interlocutory Appeal from an Order of the United States
District Court for the District of Columbia

THOMAS A. FLANNERY
STEPHEN A. TRIMBLE
916 Union Trust Building
Washington, D. C. 20005
Attorneys for Appellant

Of Counsel:

HAMILTON AND HAMILTON
916 Union Trust Building
Washington, D. C. 20005

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 30 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CLERK



STATEMENT OF QUESTION PRESENTED

Is an injured employee who has accepted compensation pursuant to the provisions of the Longshoremen's and Harbor Workers' Act (33 U.S.C. § 901 et seq.) the real party in interest, and does he have standing to sue a third person, when all right of said employee to sue such third person has been assigned to his employer due to the failure of said employee to bring such suit within the six-month time limit provided by the Act, 33 U.S.C. § 933(b)?



INDEX

	Page
Jurisdictional Statement	1
Statement of the Case	1
Statutes Involved	3
Statement of Points	3
Summary of Argument	3
Argument	3
I. The plain language of the statute indicates that the appellee is not the real party in interest and has no standing to sue	3
II. The law prior to the 1959 Amendment of 33 U.S.C. § 933	5
III. The legal effect of the assignment created by Section 933	6
IV. The court below misplaced its reliance upon subsections (d) and (e) of Section 933 of the Compensation Act	7
V. The legislative history of the 1959 Amendment to the Act	9
a. The House Committee Report	9
b. The Senate Committee Report	10
VI. The New York Case Law	13
Conclusion	17
Statutory Appendix	18

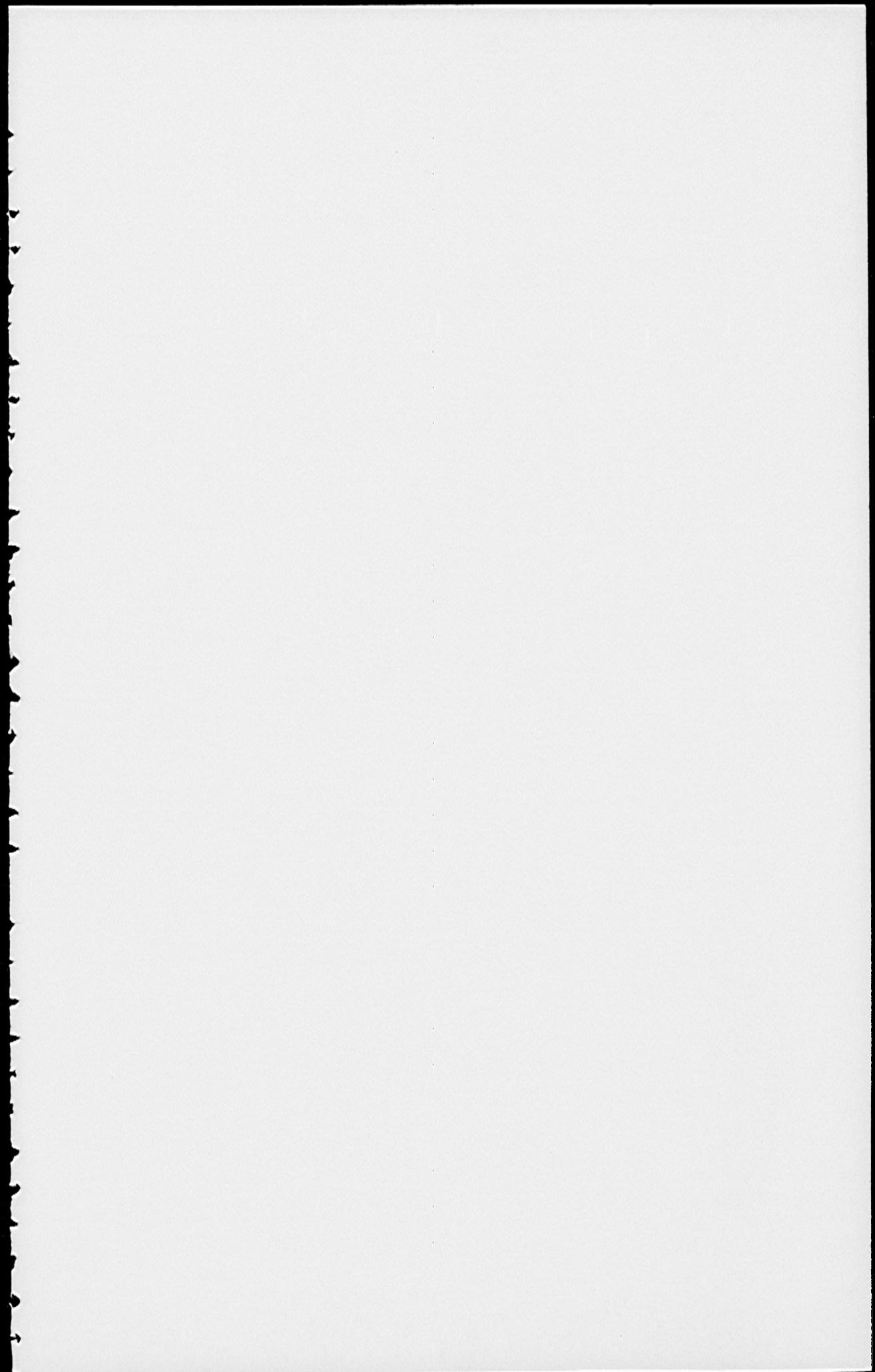
TABLE OF AUTHORITIES CITED CASES:

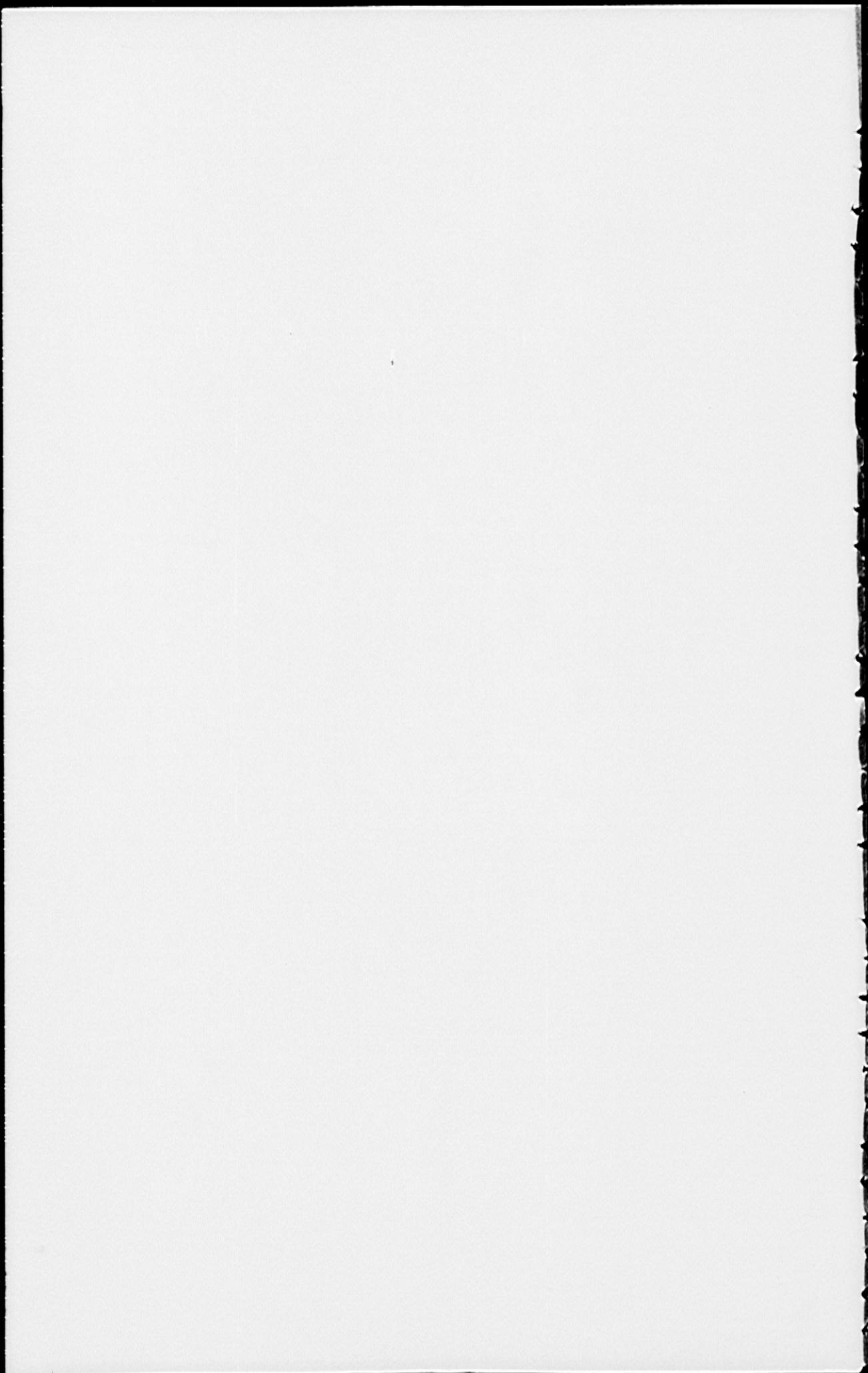
<i>Alexander v. Creel</i> , 54 F. Supp. 652 (E.D. Mich. 1944)	14
<i>Czaplicki v. The Hoegh Silvercloud</i> , 351 U.S. 525 (1955)	8, 13
<i>Ex Parte Collett</i> , 337 U.S. 55 (1948)	9

Index Continued

	Page
* <i>Moore v. Hechinger</i> , 75 U.S. App. D.C. 391, 127 F. 2d 746 (1942)	4, 6, 8, 12, 17
<i>Taylor v. New York Central</i> , 62 N.E. 2d 777, 294 N.Y. 397 (1945) Cert. denied 326 U.S. 786	13
 RULES:	
Rule 17(a), Federal Rules of Civil Procedure	3
 STATUTES:	
Title 28 U.S.C. § 1332	1
Title 28 U.S.C. § 1292(b)	1
Title 33 U.S.C. § 901, et seq.	2, 3, 4
Title 33 U.S.C. § 933	3, 4, 5, 6, 7, 17
(See also Statutory Appendix)	18
D.C. Code §§ 11-301, et seq.	1
D.C. Code §§ 36-501, et seq.	4

* (Case chiefly relied upon)





IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 18,252
—

POTOMAC ELECTRIC POWER COMPANY, *Appellant*

v.

JOHN F. WYNN, JR., *Appellee*

—
Interlocutory Appeal from an Order of the United States
District Court for the District of Columbia

—
BRIEF FOR APPELLANT

—
JURISDICTIONAL STATEMENT

Jurisdiction in the court below was pursuant to Title 28 U.S.C. § 1332 and the District of Columbia Code (1961 Edition), § 11-301 *et seq.* Jurisdiction of this court to review the order entered below is premised upon Title 28 U.S.C. § 1292(b).

—
STATEMENT OF THE CASE

Appellee John F. Wynn, Jr., plaintiff below, alleged that on August 1, 1960, he was employed as a lifeguard at the Banneker Swimming Pool in Washington, D. C., and was injured as a result of an electric shock (J.A. 4, 5). Appellee Wynn was employed at the time by Government

Services, Inc. (J.A. 4, 5), which corporation operated said swimming pool.

Appellee Wynn subsequently applied for and received a compensation award pursuant to the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. § 901 et seq. (Act of March 4, 1927, c. 509, § 1, 44 Stat. 1424; as amended August 18, 1959), pursuant to an order entered by the Deputy Commissioner on March 9, 1962 (J.A. 44).

On January 30, 1962, appellee filed a common law action against one Ansel P. Kelley, an independent electrical contractor who maintained the electrical operation of said pool (J.A. 2).

On July 17, 1963, approximately 35 months after his alleged injury and some 16 months after said compensation award, appellee Wynn filed an amended complaint, naming for the first time as a defendant the appellant Potomac Electric Power Company (J.A. 4), alleging that its negligence caused the injuries complained of.

The appellant Potomac Electric Power Company filed a motion to dismiss (J.A. 10), which, after the relevant facts outlined above were stipulated to by counsel, was treated by the court below as a motion for summary judgment (J.A. 44). This motion was based upon the proposition that the appellee, by his failure to file said suit against appellant Potomac Electric Power Company within six months after his compensation award, lacked standing to sue, and was not the real party in interest because of the statutory assignment of all right of the employee to recover damages against the Potomac Electric Power Company to the appellee's employer pursuant to 33 U.S.C. § 933(b) (J.A. 44).

This motion was argued on two occasions before Judge Alexander Holtzoff, who, pursuant to a memorandum opinion (J.A. 43) denied the same (J.A. 42). This interlocutory appeal, authorized by this court on January 6, 1964, followed.

STATUTES INVOLVED

(See statutory appendix)

STATEMENT OF POINTS

The District Court erred when it declined to enter a summary judgment in favor of the appellant Potomac Electric Power Company, defendant below, on the basis that the appellee John F. Wynn, Jr., plaintiff below, was not the real party in interest, and had no standing to sue.

SUMMARY OF ARGUMENT

In view of the appellee's acceptance of compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.) and by the appellee's failure to sue the appellant, (an allegedly negligent third party), within six months after acceptance of such compensation, the appellee, an injured employee, was divested by Section 933(b) of said Act of all right to recover damages from such third party, and is not a real party in interest, and thus has no standing to sue.

ARGUMENT**L**

**THE PLAIN LANGUAGE OF THE STATUTE INDICATES THAT
THE APPELLEE IS NOT THE REAL PARTY IN INTEREST AND
HAS NO STANDING TO SUE.**

Rule 17(a) of the Federal Rules of Civil Procedure provides in part as follows:

"... Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest;
..."

As will be seen, the plaintiff is not such a real party in interest due to the fact that the Longshoremen's and Harbor Workers' Act (33 U.S.C. § 933(b)) assigns to his employer "all right . . . to recover damages . . ." if such

injured employee did not himself bring an action against such third person within six months after his compensation award.

The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.*) is made applicable to the District of Columbia by virtue of the provisions of the District of Columbia Code (1961 Edition), § 36-501, *et seq.* (Act of May 27, 1928, Ch. 612, § 1, 45 Stat. 600).

Under the specific provisions of the Compensation Act dealing with compensation for injuries where third persons are liable (33 U.S.C. § 933), the Act provides:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within 6 months after such award.
* * * ,"

Since the appellee did not commence his action against the appellant Potomac Electric Power Company within six months after the date of his compensation award, all his right to recover damages against the appellant was assigned, by operation of law, to the appellee's employer.

With the right to sue assigned by the statute to the appellee's employer, it is clear that the appellee has no standing to sue, and is not the real party in interest (Cf. *Moore v. Hechinger*, 75 U.S. App. D.C. 391, 127 F2d 746).

II.

**THE LAW PRIOR TO THE 1959 AMENDMENT OF 33 U.S.C.
§ 933.**

Prior to its 1959 amendment, Section 933 provided as follows:

“(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the Deputy Commissioner in such manner as the secretary may provide, to receive such compensation or to recover damages against such third person.

“(b) Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

* * *,

It is readily seen by a comparison of Section 933 as it existed before the 1959 amendment with the same section after the 1959 amendment, that the only change in the statute was to eliminate the requirement for an election by the employee as to what course of action he desired to pursue, and to allow him to pursue either remedy, or both. As shown by the 1959 amendment to paragraph (b), however, *the assignment of the right to recover damages remained the same*, except that such assignment was not operative if the employee filed his third party action within the time specified, namely six months after the award.

Thus, the nature of the assignment was not changed by the 1959 amendment. The only change made concerning the assignment dealt with when, if ever, the assignment becomes operative.

III.**THE LEGAL EFFECT OF THE ASSIGNMENT CREATED BY
SECTION 933.**

As shown above, the assignment of "... all right . . . to recover damages . . ." created by Section 933(b) is the same as the assignment provision of the same statute prior to the 1959 amendment, except as to when, if ever, the assignment becomes operative.

As to the legal effect of the assignment, insofar as an injured employee is concerned, we may look to this court's holding in the case of *Moore v. Hechinger, supra*. In that case, as here, the sole question centered on whether an injured employee was the real party in interest after the assignment became operative. After an exhaustive review of the authorities, this court said:

"... Enough has been said to show that the cases all hold that, where the injured employee has accepted compensation, Section 33(b) transfers 'all rights' to recover damages from the third party to the employer. The right or interest in the employee under 33(e) (2) arises only after a successful suit by the employer and the recovery of an excess. If this is correct, there can be no doubt that the employee is not, under 17(a) of the new rules, a *real party in interest*, and to join him as a party plaintiff would be contrary to the terms of that rule, which requires the action to be prosecuted in the name of the real party in interest. Furthermore, reason compels this conclusion, for if the employee is a necessary or proper party, the freedom of action which the statute vests in the employer in the circumstances we are considering would be lost. He could neither dismiss, settle, nor prosecute over the objection of his co-plaintiffs. His hands would be tied, and the thing which the statute gives him absolutely would be subject to the control of another. Such a result the language of the statute does not warrant. Therefore, we are of opinion that in this case the employer was the true and real party in interest and must sue in his own name. . . ."

IV.

**THE COURT BELOW MISPLACED ITS RELIANCE UPON
SUBSECTIONS (d) AND (e) OF SECTION 933 OF THE COM-
PENSATION ACT.**

In its memorandum opinion, the court below was of the view that the plain language of subsections (a) and (b) of Section 933 should not be followed, because of the language contained in subsections (d) and (e) of the same section. As concerns the effect of these sections, the court below stated as follows (J.A. 45):

“... If the statue stopped at this point the Court would agree with counsel for the defendant that the plaintiff has lost all his rights to bring suit by not doing so within the six months period. The statute, however, proceeds, in subsection (d), as follows:

‘Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.’

“In other words, subsection (d) places a limitation on the assignment. It is not an assignment for all purpose. It confers on the employer the right to institute and maintain proceedings or to compromise the claim with such third person. It does not authorize him to do nothing about it. The statute unfortunately does not indicate what should happen if the employer does nothing about the matter. It is what might be called a *casus omissus*.

“Now we proceed to the following subsection, subsection (e). That section provides, in effect, that if the employer recovers any damages whether or not as a result of a compromise he shall first reimburse himself for all expenses, plus one-fifth of the excess, which presumably is compensation for his trouble, and then pay the balance to the employee. In other words, the employee retains what might be called an equitable right in the claim because he is interested in the outcome. His position is analogous to that of a *cestui que trust*, and the position of the employer, who is the

assignee of the legal title to the claim is analogous to that of a trustee, who, however, is empowered to reimburse himself for his expenses and receive compensation for his trouble.

"To go back to subsection (d), that provision indicates that the assignment to the employer is not an absolute or complete assignment but confers on the employer certain limited powers. It does not confer upon him the power to abandon the action. The difficulty, of course, is that Congress apparently did not foresee the possibility of an abandonment of the action and, not anticipating such a contingency, has made no provision for it. It is necessary, therefore, to endeavor to interpret Congressional intent and the purpose of the statute...."

It is submitted by the appellant that the reliance placed upon these sections, as indicated in the above language, was misplaced, for the reason that subsection (d) was contained in the same statute at the time of this court's decision in the case of *Moore v. Hechinger, supra*, and further, that subsection (e) was likewise contained in the statute at that time (although the method of distribution was slightly different).

Judge Holtzoff also observed that Congress apparently did not foresee the possibility of an abandonment of the action, but in this observation he was mistaken, for as shown in the report of the House Committee (J.A. 13), such abandonment of the cause of action was explicitly recognized (See also *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1955)).

The appellant therefore submits that the court below, basing its decision to a large extent on subsections (d) and (e) of § 933, was in error, for such reliance was misplaced.

V.

**THE LEGISLATIVE HISTORY OF THE 1959 AMENDMENT TO
THE ACT.**

The appellant submits that the assignment provision contained in subsection (b) of the Act is perfectly clear, and that there is no need to refer to its legislative history. (See *Ex Parte Collett*, 337 U.S. 55, 61 (1948)).

However, should this court determine that it is necessary to refer to such legislative history, it will be seen that such history shows that the statute means exactly what it says, i.e. that if the injured employee does not sue within the six-month period, all such right to sue is assigned to his employer.

On January 7, 1959 H.R. 451 was introduced in the House of Representatives. The bill was referred to in the "Congressional Record" on twelve occasions but at no time was there a discussion on the floor of the House or Senate relative to the intent of Congress as regards the assignment provision contained in the Bill. The amendment to 33 U.S.C. § 933 was signed by the President on August 19, 1959.

The amendment, as was originally drawn (with several minor changes in language) appears in the House Report No. 229 (J.A. 10). The House passed the bill in conformity with House Report No. 229. The Senate then made substantial changes in the wording on the advice of the Department of Labor as shown in Senate Report No. 428 (J.A. 23). The Senate's version was accepted by the House, and the amendment was thereafter enacted into law based on the Senate changes (See Statutory Appendix).

(a) The House Committee Report

As shown by House Report No. 229 (J.A. 10), the intent of the House behind the amendment of the Longshoremen's Act as respects the problems involved with third party liability is clear.

As shown by the House Report, the House Committee on Education and Labor indicated that the existing law created certain hardships and problems, and (on page 3 of the Report) that it was aware of developments under the Act, *including the automatic assignment of a third party cause of action to the employer and the refusal by the employer to prosecute the third party claim because of a conflict of interest.*

The House Report likewise shows (J.A. 15) that under the amendment the employee would be able to commence his remedy at law within six months after the compensation award. The report further shows that if the employee did not commence the action within the time limits prescribed, the failure to do so would create an assignment of the cause of action to the employer (with further provisions as to notice, etc.).

The House goes on further to state that "in the event the employer . . . recovers from the third person . . ." Thus, the Committee, by use of this language, must have foreseen circumstances where the employer would not attempt to recover, or would not be able to recover, from the third party, as neither H. R. 451 nor the House Bill anywhere makes it mandatory for the employer to sue the third party after the assignment of the cause of action.

(b) The Senate Committee Report

Of particular interest is the Report of the Senate Committee on Labor and Public Welfare (J.A. 23), inasmuch as the Senate's amendment of H.R. 451 was ultimately enacted into the present law.

In discussing the "Purpose of the Bill" (J.A. 25), the Report says:

" . . . In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-

fifths of the amount after necessary expenses . . . and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net recovery and [sic] incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible."

Thus the Committee made it clear that there was to be an assignment of the cause of action if the employee did not file his third party suit within six months of the compensation award. It is likewise clear that the Committee did not anticipate a third party suit would be filed by the employer in every case, as shown by the words ". . . *in the event* the employer institutes proceedings . . ." The Committee also made it clear that the statute provides *only an incentive* for the employer to take action. It is likewise evident that there is no compulsion placed on the employer to sue, either in the Senate Report or in the statute itself, and that there is to be no reassignment if the employer does not sue.

Also of significance are the recommendations of the Department of Labor to the Senate Committee, as these recommendation appear to have inspired the Senate's version of the bill which ultimately became law.

The letter of the Acting Secretary of Labor to Senator Hill (J.A. 31) stated in part that "under certain circumstances it would permit acceptance of compensation benefits and an action by the employee or his representative against the third party."

Thus it would appear that the view of the Department of Labor was that the bill would allow suits by the employee against the third party *only under certain circumstances*. Thus, if the *prescribed circumstances were not present*, such as the filing of the third party action within the time limit provided in the statute, the employee could not accept compensation and also sue the third party.

Further, the explanation of the Department of Labor proposal to amend Section 933 (J.A. 39) states:

"The purpose of this proposed amendment, like that of proposed legislation now pending in Congress, is to amend section 33 of the Longshoremen's and Harbor Workers' Compensation Act to permit an insured employee, or his dependents in case of death from injury, to pursue a third party remedy while receiving compensation, under certain conditions. That purpose may be accomplished by amending the existing provisions which, in general, have operated satisfactorily over the years. In addition, re-enacting the section with language changes, rather than enacting an entirely new section, would permit the continuance of the current judicial construction of much of the section.

"Under subsection (a) of section 33, a person entitled to compensation under the Act on account of disability or death would not be required to elect between compensation and a suit against a third person for damages when he determined that a person other than the employer may be liable. Therefore, the person entitled to compensation could pursue both remedies concurrently.

"Section 33(b) provides that unless the person entitled to compensation brings an action for damages against the third person within six months after acceptance of compensation under an award in a compensation order filed by the deputy commissioner, the acceptance shall operate as an assignment of the cause of action to the employer. In other words, if the party entitled to compensation does not bring a third action within the stipulated time, the employer may seek recovery."

Thus it would appear that the Department of Labor contemplated the continuance of the current judicial construction of the section. This would, of course, include the legal effect of the assignment to the employer, as announced in the case of *Moore v. Hechinger, supra*.

In conclusion it appears from the legislative history of the statute that the particular problem in the instant case

was one for which a remedy was placed in the statute. It is manifest that Congress, by giving a six months period in which the employee could sue the third person after the employee had received his compensation award, provided a simple and effective solution to the problems which arose from the *Czaplicki Case*, supra. It is evident that the six month period provides a reasonable time for the injured employee to determine whether or not he is satisfied with his compensation award, and, if not, to determine whether or not a suit would properly lie against a third party. It is likewise clear that Congress had *no intent* to effect a reassignment of the cause of action to the employee under the circumstances of either the *Czaplicki Case* or this case, for if Congress had intended a reassignment, it would have placed such a provision in the statute.

VI.

THE NEW YORK CASE LAW.

As the present statute was patterned after the Workmens Compensation Law of New York, the case holdings on the New York statute become particularly relevant in construction of the assignment provisions.

The New York Court of Appeals, in an unanimous opinion by Judge Desmond, in the case of *Taylor v. New York Central*, 62 N.E. 2d 777, 294 N.Y. 397, cert. denied 326 U.S. 786, had occasion to review the assignment provisions of the New York Workmen's Compensation Law.

In that case, the plaintiff had filed a common law negligence action after the time limit in the statute, claiming the assignment provision of the statute was inoperative because the assignee was disabled from prosecuting the third party action.

The court, in affirming a dismissal which was based on the plaintiff being divested by the statute of his right to sue because of the time lapse said:

".... Under section 29 of the Workmen's Compensation Law it is unnecessary for the injured employee to

choose in the first instance between taking compensation and pursuing by suit his cause of action against a third person alleged to have injured him. He may take the compensation from his employer or his employer's insurer and nonetheless bring an action against the third person. But "such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues." If the injured workman fails to bring the action within the time so limited, "such failure shall operate as an assignment of the cause of action against such other *** to the person *** liable for the payment of such compensation." That is plain language. The cause of action, after the stated time has gone by, passes to the employer or insurer. No exception is supplied for a situation where the compensation payer has in advance disabled himself, by agreement or release, from taking advantage of the employee's cause of action thus automatically assigned. Finding no such exception, we would be legislating if we read one in, and that we cannot do"

A case also on point regarding the New York act is *Alexander v. Creel*, 54 F. Supp. 652 (E.D. Mich. 1944—Judge Lederle). In that case, the plaintiff, who had accepted compensation under the New York Act, brought suit against the defendant (a third party) more than six months after the receipt of the compensation award. The defendant asserted that the plaintiff was not the real party in interest pursuant to the New York statute. The court, after setting forth the provisions of the New York statute, and determining that New York law was applicable, stated at page 655:

"There appears no question but that if we apply New York law, the compensation insurer is the legal owner of this cause of action.

"*Nelson v. Buffalo Niagara Elec. Corp.*, 1942, 264 App. Div. 941, 36 N.Y.S. 2d 205, in dismissing an employee's action against a third person, commenced more than six months after an award, said:

'In as much as the plaintiff's action was not commenced within six months from that date (first award of compensation) such cause of action became the property of the person, corporation or fund which paid the compensation. Workmen's Compensation Law, Sec. 29, Sub. 2. Plaintiff, therefore, lacks capacity to sue (Civil Practice Act, Sec. 210, see also, Waite Nursery & Development Co. v. Just, 266 N.Y. 496, 195 N.E. 169) and the motion to dismiss the complaint should have been granted.'

"Dismissing a like action commenced by the employee more than one year after the injury occurred, the court in Calagna v. Sheppard-Pollak, Inc., 1942, 264 App. Div. 589, 35 N.Y.S. 2d 934, 937 (appeal dismissed 289 N.Y. 753, 46 N.E. 2d 355), disregarding a dispute as to date of compensation award, stated:

The amendments to § 29 adopted in 1937 altered to some extent the provisions for the assignment of claims against third parties. Since those amendments, compensation may be accepted by the injured person and an action brought against third parties as well, provided the injured workman commences the third party action within the times specified in the amended section. In case such an action is brought, the carrier is granted a lien on the proceeds of any recovery by the injured employee from third parties, to the extent of any compensation which may have been awarded. But the amended section provides that if the injured employee has taken compensation and failed to commence his action against the third party within the times specified therein, such failure operates as an assignment of the said cause of action to the employer, or the insurance carrier, or other persons liable for the payment of compensation.' "

The court further went on to say, at page 662, that:

"Defendant also argued that Section 29 of the New York act is a statute of limitations, limiting the time within which suit might be instituted on the cause of action against the third person, and that, as such, the statute operated to bar this action. Plaintiff agreed that this was a statute of limitations, but relied on

the general conflict of laws rule that the applicable statute of limitations would be that of the forum, which is three years. Sec. 13976, 1929 Mich. Comp. Laws, M.S.A. 27.605, citing 37 C.J. 729; Home Life Ins. Co. v. Elwell, 1897, III Mich. 689, 70 N.W. 334; Dowse v. Gaynor, 1908, 155 Mich. 38, 118 N.W. 615.

"[13] Statutes of limitations are statutes of repose. McKisson v. Davenport, 1890, 83 Mich. 211, 47 N.W. 100, 10 L.R.A. 507. They contemplate a procedural bar to the right to prosecute a cause of action. The statute in question does not merely specify a limit for judicial enforcement of the cause of action against the third party; it does not abolish the complete cause of action, nor does it cut off all remedy thereon. It contemplates the continued vitality of the cause of action and defines the rights of the employer (or insurer) and employee in and to the cause of action, specifying title rights. It subordinates the employee's title in the first instance to the employer's or insurer's lien. It then specifies the conditions under which such encumbered title is divested from the employee and the absolute title vested in the employer or insurer. When this statutory assignment of the cause of action occurs, the lien of the employer or insurer merges in his title, and no corresponding lien, right or control of the cause of action is granted back to the employee. If, and only if, a sum in excess of compensation payments and legal expenses is recovered by the employer, or insurer, as assignee—which may be by suit or settlement—does any right accrue to the employee, and this right is merely a personal obligation of the employer or insurer to pay the employee not this excess amount, but two-thirds only of such excess. It might be said that the statute gives the employee a specified period of time within which to elect to assign to the employer or insurer title to the cause of action, 'if such injured employee * * * has taken compensation' under the Act. As applied to the facts of this case, the conditions specified in the statute are, as the payment of compensation in Chapman v. Griffith-Consumers Co., 71 App. D.C. 64, 107 F. 2d 263, conditions precedent for the assignment to the employer's insurer of the cause of action. Under the conditions

here involved, the statute operated to abolish plaintiff's title in the cause of action by effecting an assignment thereof to the employer's insurer."

CONCLUSION

The appellant submits that the ruling of the court below effect a complete departure from the holding of this Court in the case of *Moore v. Hechinger, supra*, that the employee is not the real party in interest, since there has been no change in the legal effect of the assignment of the right to sue by the 1959 amendment to 33 U.S.C. § 933.

For this reason, the appellant submits that the order of the court below was error, and that the same should be reversed, with instructions to enter judgment in favor of the appellant.

Respectfully submitted,

THOMAS A. FLANNERY
STEPHEN A. TRIMBLE
Attorneys for Appellant

Of Counsel:

HAMILTON AND HAMILTON
916 Union Trust Building
Washington, D. C. 20005

April 30, 1964

STATUTORY APPENDIX**I. Title 33 U.S.C. § 933 (prior to the 1959 amendment):**

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

- (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and
- (2) The employer shall pay any excess to the person entitled to compensation or to the representative.
- (f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.
- (g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e)¹ of this section only if such compromise is made with his written approval.
- (h) The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.
- (i) Where the employer is insured and the insurance carrier has assumed the payment of the compensa-

tion, the insurance carrier shall be subrogated to all the rights of the employer under this section. Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

II. Title 33 U.S.C. § 933 (subsequent to the 1959 amendment):

- (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
- (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.
- (c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.
- (d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.
- (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
 - (1) The employer shall retain an amount equal to—
 - (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

- (B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
 - (C) all amounts paid as compensation;
 - (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and
- (2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.
- (f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.
 - (g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval.
 - (h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) the right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer. As amended Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391.





CONTENTS OF JOINT APPENDIX

	Page
Docket Entries	1
Complaint	2
Amended Complaint	4
Answer of Defendant Potomac Electric Power Company to Amend Complaint	8
Motion of Defendant Potomac Electric Power Company to Dismiss	10
Exhibit No. 1: House Report No. 229	10
Exhibit No. 2: Senate Report No. 428	23
Exhibit No. 3: Letter James T. O'Connell to Honorable Lister Hill, with enclosures	31
Order, filed November 21, 1963	42
Opinion, delivered November 18, 1963	43
Notice of Appeal	49



JOINT APPENDIX

Docket Entries

1962

Jan. 30—Complaint, appearance, Jury demand—filed

1963

Jul. 17—Amended complaint; Jury demand—filed

Aug. 8—Answer of deft #2 to amended complaint; c/m
8/8/63—filed

Sep. 11—Motion of deft Pepco to dismiss; P&A; c/m
9-11-63, MC 9-11-63—filed

Nov. 15—Supplemental memorandum of Pepco in support
of motion to dismiss c/m 11-15-63—filed

Nov. 21—Order treating motions of defendants, Potomac
Electric Power Company & District of Columbia to dis-
miss as motions for summary judgment & denying said
motions; granting said defendants leave to apply to
U.S.C.A.D.C. for interlocutory appeal (n)—Holtzoff, J.

Dec. 5—Revised transcript of oral opinion delivered No-
vember 18, 1963. (fiat)—Holtzoff, J.

1964

Jan. 14—Notice of appeal by plaintiff from order of Nov.
21, 1963, Copies mailed to Lesser & Lesser, Corpora-
tion Counsel, and Ansel P. Kelly, Deposit \$5.00 by
Trimble—filed

(Filed Jan. 30, 1962)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 330-'62

JOHN F. WYNN, JR.
741 Longfellow Street, N. W.
Washington, D. C.
Plaintiff

vs.

ANSEL P. KELLY
c/o Potomac Park Motor Court
East Potomac Park
Washington, D. C.
Defendant

Complaint

(Personal Injuries Caused by Negligent
Electrical Repairs)

1. Plaintiff is a citizen and resident of the District of Columbia. The accident hereinafter complained of occurred in the District of Columbia. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.
2. On August 1, 1960 and for some time prior thereto the plaintiff had been employed as a lifeguard by Government Services, Inc., which corporation operates, maintains and supervises the Banneker Playground Swimming Pool located at 2500 Georgia Avenue in the District of Columbia.
3. On August 1, 1960 and for some time prior thereto the defendant was employed by the said Government Services, Inc., as an independent contractor for the electrical repair and maintenance of the said swimming pool.
4. On August 1, 1960 while the plaintiff was performing his duties as a lifeguard at said swimming pool he

sustained a severe electrical shock when he entered the water in the said swimming pool as a result of the negligence of defendant in making faulty repairs to the electrical system in the pool and in permitting the pool to be left in a dangerous and hazardous condition without warning to plaintiff and to others using the pool.

5. As a result of said electrical shock the plaintiff sustained severe, serious, painful, disabling and permanent injuries to his nervous system and other organs of his body; he sustained severe organic, psychological and emotional injuries which have resulted in permanent disabilities of an organic and psychogenic nature; he has required and will in the future continue to require medical treatment and hospital care; he has lost time and will continue to lose time from his regular duties and employment and his power to labor and to earn money has been permanently impaired.

WHEREFORE the plaintiff demands judgment against the defendant in the sum of \$100,000.00 besides interest and costs.

LESSER & LESSER

By: _____

Philip J. Lesser

By: _____

I. Irwin Bolotin

By: _____

John J. Bensignore
917 - 15th St., N.W.
Washington, D. C.
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

By: _____

I. Irwin Bolotin
Attorneys for Plaintiff

(Filed July 17, 1963)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 330-62

JOHN F. WYNN, JR., 741 Longfellow Street, N. W.,
Washington, D. C., *Plaintiff*

v.

ANSEL P. KELLEY, Box 13, Woodbridge, Virginia
and

POTOMAC ELECTRIC POWER COMPANY, a corporation,
10th and E Streets, N. W., Washington, D. C.

and

DISTRICT OF COLUMBIA, a municipal corporation,
District Building, Washington, D. C.

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
2133 Wisconsin Avenue, N. W., Washington, D. C.

Defendants

Amended Complaint

(Personal Injuries Caused By Negligent Electrical
Installation, Repairs and Maintenance)

1. Plaintiff is a citizen and resident of the District of Columbia. The accident hereinafter complained of occurred in the District of Columbia. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.00.

2. On August 1, 1960 and for some time prior thereto the plaintiff had been employed as a lifeguard by Government Services, Inc., which corporation operates and super-

vises the Banneker Playground Swimming Pool located at 2500 Georgia Avenue in the District of Columbia.

3. On August 1, 1960, and for some time prior thereto the defendant, Ansel P. Kelley, was employed by the said Government Services, Inc., as an independent contractor for the electrical repair and maintenance of said swimming pool.

4. On August 1, 1960, the plaintiff was performing his duties as a lifeguard at said swimming pool when as a result of the negligence of the defendants, he sustained a severe electrical shock and the other injuries hereinafter alleged, as he entered the water of the swimming pool.

5. The negligence of the defendant, Ansel P. Kelley, consisted of making faulty repairs on or about said date to the electrical system and in causing or permitting the water in the swimming pool to become charged with electrical current.

6. The negligence of the defendants, Potomac Electric Power Company, and of the District of Columbia, consisted of furnishing and/or permitting electrical current to be supplied to the operator of said swimming pool without first ascertaining that it was reasonably safe so to do; in failing to make and/or to require proper and adequate inspections of the electrical system including the equipment and fixtures at said swimming pool; in failing to see to it that safe and proper electrical equipment and fixtures were installed and maintained; in using and/or permitting an electrical current in dangerous voltages to be carried through the electrical system of said swimming pool; in permitting the wiring and insulation thereat to become and remain old, worn, broken and water soaked; in installing and/or permitting the installation of electrical wiring of insufficient design to carry the electrical current through said system; in maintaining and/or permitting the maintenance and use of a defective and inadequate circuit breaker; in permitting the use of defec-

tive electrical equipment and electrical fixtures at a time when the swimming pool was being used by members of the public; in failing to take adequate measures to guard against the use of defective and faulty wiring and electrical fixtures and equipment at said swimming pool; in permitting unqualified and unlicensed personnel to make repairs to the electrical equipment and installation; in failing to take adequate measures or to see to it that the use of the pool by the public was reasonably safe; in failing to guard against and to take adequate measures to prevent short circuits reasonably to be anticipated; in failing to see to it and require that the operator of the pool should use proper electrical fixtures and equipment; in failing to disconnect and make harmless the defective underwater electrical system; in failing to take measures to stop the supply of electrical current and other services to the operator of the swimming pool until the defective fixtures and equipment were disconnected; in violating applicable police regulations, building regulations and electrical code provisions.

7. The defendant, Indemnity Insurance Company of North America, issued its Workmen's Compensation Policy of insurance to plaintiff's employer, Government Services, Inc., and under the terms of which policy the said defendant reserved the right to inspect the workplaces and equipment to be used by plaintiff, and covered by said policy. The negligence of this defendant consisted of its failure to make a proper and adequate inspection of the plaintiff's workplace including the electrical equipment, fixtures and facilities; and in making an improper and negligent inspection connected with its Workmen's Compensation Policy; and in failing to ascertain that the plaintiff had been provided with a reasonably safe place to work.

8. As a result of the electrical shock received by the plaintiff as aforesaid, he sustained severe, serious, painful,

disabling and permanent injuries to his nervous system and other organs of his body; he sustained severe organic, psychological and emotional injuries which have resulted in permanent disabilities of an organic and psychogenic nature; he has required and will in the future continue to require medical treatment and hospital care; he has lost time and will continue to lose time from his regular duties and his power to labor and earn money has been permanently impaired.

WHEREFORE the plaintiff demands judgment against the defendants, and each of them, in the sum of \$100,000.00, besides interest and costs.

LESSER & LESSER

By:

PHILIP J. LESSER

By:

I. IRWIN BOLOTIN
917-15th Street, N. W.
Washington, D. C. 20005
DI 7-5909

Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues.

By:

I. IRWIN BOLOTIN
Attorneys for Plaintiff

(Filed Aug. 8, 1963)

**Answer of Defendant Potomac Electric Power Company to
Amended Complaint**

Comes now the defendant Potomac Electrical Power Company and in answer to the Amended Complaint filed in the above-entitled action states as follows:

FIRST DEFENSE

The Amended Complaint fails to state a claim against this defendant upon which relief may be granted.

SECOND DEFENSE

The defendant Potomac Electric Power Company for its second defense answers the numbered paragraphs of the Amended Complaint as follows:

1. It is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 1. It admits the remaining allegations contained in paragraph 1.
2. It is without knowledge and information sufficient to form a belief as to the allegations contained in paragraphs 2 and 3.
3. It is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 that on August first, 1960 the plaintiff was performing his duties as a lifeguard or that he sustained a severe electrical shock and other injuries, or that he entered the water of the swimming pool. It denies the allegation of negligence contained in paragraph 4.
4. The allegations contained in paragraph 5 do not pertain to this defendant, and therefore no answer to it is required by this defendant.
5. Insofar as the allegations contained in paragraph 6 pertain to this defendant, they are denied.

6. The allegations contained in paragraph 7 do not pertain to this defendant, and therefore no answer to it is required by this defendant.

7. It is without knowledge and information sufficient to form a belief as the truth of the allegations contained in paragraph 8.

The defendant Potomac Electric Power Company denies that the plaintiff is entitled to judgment against it in the amount claimed, or any part thereof.

THIRD AND AFFIRMATIVE DEFENSE

The defendant Potomac Electric Power Company for its third and affirmative defense alleges that the damages and injuries, if any, sustained by the plaintiff were the result of the plaintiff's own sole or contributory negligence.

FOURTH AND AFFIRMATIVE DEFENSE

The defendant Potomac Electric Power Company for its fourth and affirmative defense alleges that the injuries and damages, if any, sustained by the plaintiff were the result of the plaintiff's assumption of the risk.

WHEREFORE, the defendant Potomac Electric Power Company prays that the Amended Complaint filed herein be dismissed with costs.

HAMILTON AND HAMILTON

By /s/ THOMAS A. FLANNERY
Thomas A. Flannery

By /s/ STEPHEN A. TRIMBLE
Stephen A. Trimble
Attorneys for Defendant,
Potomac Electric
Power Company
916 Union Trust Building
Washington 5, D. C.

(Filed Sept. 11, 1963)

**Motion of Defendant Potomac Electric Power Company
to Dismiss**

Comes now the defendant Potomac Electric Power Company by its attorneys, Hamilton and Hamilton and moves this Court for an order dismissing the plaintiff's amended complaint against it filed herein, and as grounds therefor, respectfully directs the Court's attention to the attached memorandum of Points and Authorities.

HAMILTON AND HAMILTON

By /s/ THOMAS A. FLANNERY

/s/ STEPHEN A. TRIMBLE
*Attorneys for Defendant,
Potomac Electric
Power Company*

916 Union Trust Building
Washington 5, D. C.

(Filed Nov. 15, 1963)

Exhibit No. 1

86TH CONGRESS } REPORT
1ST SESSION } HOUSE OF REPRESENTATIVES } No. 229
COMPENSATION FOR INJURIES UNDER LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT WHERE THIRD
PERSON IS LIABLE

MARCH 19, 1959.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. BARDEN, from the Committee on Education and Labor, submitted the following

R E P O R T

[To accompany H.R. 451]

The Committee on Education and Labor, to whom was referred the bill (H.R. 451) to amend the Longshoremen's

and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 3, line 18, after "registered" insert "or certified".

Page 6, line 10, strike out "killed" and insert the following: "to his eligible survivors or legal representatives if he is killed,".

EXPLANATION OF AMENDMENTS

The first amendment was made at the suggestion of the Post Office Department since certified mail is the new name for registered mail.

The second amendment merely specifies those who can act on behalf of the deceased which was inadvertently omitted when the bill was drafted.

PURPOSE

The purpose of H.R. 451 is to rectify a hardship which under the present law is suffered by harbor workers, long-shoremen, and their survivors.

Ordinarily when such a worker is injured during the course of his employment, he receives compensation. Sometimes, the injury or death is caused as a result of the negligence of a third party, in which event he is entitled to sue that third party and, usually, if he prevails, receives far more than he would under the compensation law. In such a case, that is, injury through a third party, under the present statute he or his survivors are obliged to elect either to receive compensation or to sue the third party. Many times, in spite of the fact that they have a good cause of action and could receive a greater sum of money against the third party, they are afraid to do so

because in the event of the loss of the case they would then have neither recovery in that suit nor the compensation. A further evil sometimes occurs when these people find it necessary to practically sell their claim in order to obtain support during the course of the case.

This bill will rectify this situation. It will permit the claimants to receive compensation and also to pursue the third-party lawsuit at the same time.

The claimant will not receive two sums, for the bill provides proper adjustments between the recovery in either event. If the third-party law suit brings in more money than compensation, then the claimants received the larger sum and the insurance compensation carrier has its money returned. If the sum recovered is less than the compensation, the insurance compensation carrier does not suffer as it merely pays the difference, which it would be obliged to do in any event. The bill provides safeguards for the insurance carrier and even has a provision that where a claimant does not pursue a good third-party action the insurance company may do so in certain instances in his behalf. In that event if the sum recovered is larger than the compensation, the claimants receive two-thirds of the difference over what the compensation would be and the compensation carrier receives one-third of the coverage for its efforts.

Enactment of this bill will also result in the Federal law conforming to the views held by most States on this subject.

BACKGROUND

All workmen's compensation acts are based upon a quid pro quo between employer and employee. Employers relinquish certain rights otherwise protected by law in return for which employees relinquish certain of their legal rights. By reason of this, employees are assured hospital and medical care and subsistence during the convalescence

period. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances an employee is injured by the negligence of a stranger to the employer-employee relationship. When such a situation develops, section 33 of the Longshoremen's and Harbor Workers' Compensation Act reserves to the employee the right to seek damages against the stranger, thereby enabling him to obtain, if successful, an amount larger than he would receive as compensation.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of the employment. This section also reserves to the employee the right to recover damages against third parties who may be responsible for the injury.

Section 33 pertains to employee actions against third parties responsible for the injury. This section requires the employee to elect whether to accept a compensation award or pursue his third-party action. Once a compensation award is made to the employee, the right of action against the responsible third party is automatically assigned to the employer. Thereafter, the employee has no control over subsequent action with respect to pursuing or settlement of the claim.

Developments under the act which concerned the Subcommittee on Safety and Compensation have been suits by injured workers against coemployees which have resulted in large recoveries ultimately paid by the employer; successful employee suits against a third party, who subsequently was successful in obtaining indemnification from the employer; the automatic assignment of a third-party cause of action to the employer and the refusal by the employer to pursue the third-party claim because of a conflict of interest; denial of compensation to an injured workman pending his election to bring action against a third party; extension

of the maritime doctrine of "warranty of seaworthiness" to include employees covered by the act.

Remedial legislation was introduced in the 84th Congress and extensive hearings were held by a subcommittee. That subcommittee on December 1956 recommended unanimously that the legislation be reported favorably to the full Committee on Education and Labor, since there was almost unanimous approval of the principle of the legislation by the Labor Department, management and labor organizations. During the 85th Congress this legislation was reported favorably by the committee and on July 30, 1958, passed by the House. However, when that bill was passed by the Senate an amendment was added which related to an entirely different subject, and for that reason was not acted upon in the House.

H. R. 451, which is identical to the bill passed by the House during the last session, was introduced on January 7, 1959, and reported favorably by the Subcommittee on Safety and Compensation and by the full committee.

SECTION-BY-SECTION ANALYSIS

The bill will entirely rewrite section 33 of the Longshoremen's and Harbor Workers' Compensation Act which relates to compensation for injuries where a third person is liable.

Under the existing law, an employee who is injured may receive compensation under the act even though someone other than the employer is liable to him in damages on account of the injury. In such a case, the employee may elect whether to take the compensation or to recover damages against the third person.

If the employee elects to proceed against the third party, he will be entitled to all sums he receives as damages and, in the event the amount he receives in damages is less than

the amount he would have received as compensation, he will be entitled to receive the difference from his employer.

If, on the other hand, the employee accepts compensation under an award in a compensation order filed by the Deputy Commissioner, his acceptance acts as an assignment to the employer of his rights against the third party. The employer may then either sue the third party for damages or compromise with him. Amounts received from the third party by the employer will be retained by him except that if such amounts exceed the compensation he has paid or will pay the employee, his expenses of obtaining the funds, and for medical services and supplies, he will pay over the difference to the employee or other person entitled to the compensation.

Under subsection (a) of section 33 as it would be amended by the bill, where an employee entitled to compensation is injured or killed by the negligent or wrongful act of a third person (not employed by the same employer) he or the person entitled to compensation on his behalf may receive compensation and medical benefits under this act and at the same time pursue his remedy against the third person. In other words, the employee need not elect which remedy to pursue.

Such a person will be able to commence his remedy at law at any time within 6 months after the compensation order or within 9 months after the enactment of any new laws creating, establishing, or affording a new or additional remedy. If the employee or other person entitled to compensation on his behalf receives any funds in a civil action, through settlement, or otherwise, the employer or his insurance carrier will have a lien on such funds to the extent of the total amount of compensation awarded under, or provided, or estimated, by this act for such case and the expenses for medical treatment.

Subsection (b) provides that if, in the situation referred to above, the employee or his survivors or legal representa-

tives do not commence action against the third person within the time limit set forth above, the failure will operate to assign the cause of action to the employer or his insurance carrier if the employer or his insurance carrier has given notice to the employee or other person entitled to compensation that his failure to commence action will operate as an assignment of the cause of action. If the employer or his insurance carrier doesn't give such notice until after a date at least 30 days from the last date on which he may commence the action, the period during which he may commence the action will be extended for 30 days after he has received the notice. If he hasn't begun such action by then, his failure will then operate to assign the cause of action to the employer or his insurance carrier.

In the event an employer or his insurance carrier to whom a cause of action has been assigned as described above recovers from the third person a sum in excess of the total amount of compensation awarded for the death or injury involved, expenses for medical treatment paid by it, and certain expenses of recovery, then the employee or his eligible survivors will be paid an amount equal to two-thirds of the excess.

Where the total amount of compensation is not fixed and definite, the Secretary of Labor will estimate the probable total value of it on the basis of certain actuarial tables and other facts.

Subsection (c) deals with the situation which will arise where an award of compensation is subsequently modified, or where the total amount of compensation was not fixed and definite and the amount of such payments have actually become known. It provides for appropriate adjustments between the employer or his insurance carrier and the employee or other person entitled to compensation on his behalf.

Subsection (d) provides that if the employee proceeds against the third party but recovers less than he would have received as compensation, the employer or his insurance carrier will be responsible for the difference, except that if the recovery is by way of settlement the excess will be payable only if the employer or his insurance carrier consented to the settlement.

Subsection (e) provides that compensation or benefits under this act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of another in the same employ.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics):

SECTION 33 OF LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS AMENDED (44 STAT. 1440)

[COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

[SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission¹ may provide, to receive such compensation or to recover damages against such third person.

[(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right

¹ The functions of the Commission have been transferred to the Secretary of Labor. See Reorganization Plan No. 19, 1950.

of the person entitled to compensation to recover damages against such third person.

[(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

[(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

[(e) Any amount recovered by such an employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

[(l) The employer shall retain an amount equal to—

[(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

[(B) the cost of all benefits actually furnished by him to the employee under section 7;

[(C) all amounts paid as compensation;

[(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

[(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

[(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person.

[(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.

[(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

[(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.]

COMPENSATION FOR INJURIES WHERE THIRD PERSON IS LIABLE

SEC. 33. (a) *If an employee entitled to compensation under this Act be injured or killed by the negligence or wrong of a third person not in the same employ, such employee or, in case of death, his eligible survivors or legal representative, if any, need not elect whether to take compensation and medical benefits under this Act*

or to pursue his remedy against such third person but may take such compensation and medical benefits and (within the time periods hereinafter set forth) pursue his remedy against such third person subject to the provisions of this Act. If such employee, or, in case of death, his eligible survivors or legal representative, if any, takes compensation under this Act and desires to bring action against such third person, such action should be commenced not later than six months after the entry of an order awarding compensation or not later than nine months after the enactment of such law or laws creating, establishing, or affording a new or additional remedy or remedies. In such case, the carrier liable for the payment of such compensation shall have a lien on the proceeds of any recovery from such third person, whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under, or provided, or estimated, by this Act for such case and the expenses for medical treatment paid or to be paid by it, and to such extent such recovery shall be deemed for the benefit of such carrier. Notice of the commencement of such action shall be given thirty days thereafter to the Secretary of Labor, the employer, and the carrier upon a form prescribed by the Secretary.

(b) If such employee or, in case of death, his eligible survivors or legal representative, if any, has been awarded compensation under this Act but has failed to commence action against such third person within the time limited therefor by subsection (a), such failure may operate as an assignment of the cause of action against such third person to the carrier liable for the payment of such compensation. The failure of such employee or his eligible survivors or legal representative to commence an action pursuant to the provisions of subsection (a) of this section, shall operate as an assignment of the cause of action: Provided

only, however, That the carrier shall first, after award of compensation, have notified the employee, or in the event of his death, the employee's eligible survivors and legal representative if any has been appointed, in writing by personal service or by registered mail at least thirty days prior to the expiration of the longer time limited for the commencement of an action by subsection (a), that such failure to commence such action shall operate as an assignment of whatever cause of action may exist from the employee to the carrier. If the carrier shall fail to give such notice, the time limited for the commencement of an action by subsection (a) shall be extended until thirty days after the carrier shall have served the notice required by this section, and in the event the claimant fails to commence such action within thirty days after service of such notice, such failure shall operate as an assignment of such cause of action to such carrier. If such carrier as such an assignee, recovers from such third person, either by judgment, settlement, or otherwise, a sum in excess of the total amount of compensation awarded for the death or injury of such employee and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such employee or his eligible survivors at the time of death two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his eligible survivors. When the compensation awarded requires periodical payments, the number of which cannot be determined at the time of such award, the Secretary shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institute, and such facts as he may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in

such case, for the purpose of computing the amount of such excess recovery, subject to the modification thereof as hereinafter provided.

(c) In the event of a modification of an award increasing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at the time of the award, shall exceed the total thereof as estimated by the Secretary, the principal of any of such excess recovery theretofore paid to such employee or his eligible survivors shall be credited against such increase or such excess. In the event of a modification of an award ending or diminishing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at the time of the award, shall be less than the total thereof as estimated by the Secretary, such carrier shall forthwith pay to the person entitled to compensation any additional amount of such excess recovery to which such person may be entitled by reason of such modification or such deficiency, determined as hereinbefore provided. (d) If such employee proceeds against such third person the carrier shall contribute only the deficiency, if any, between the amount of the recovery against such third person actually collected, and the compensation provided or estimated by this Act for such case, except that in the case where the amount of settlement of a claim or action against a third party is less than the compensation provided or estimated by this Act, prior approval of the employer or insurance carrier shall be required or else the carrier shall be relieved of all liability for such deficiency.

(e) The right to compensation or benefits under this Act, shall be the exclusive remedy to any employee when he is injured or killed by the negligence or wrong of another in the same employ.

Exhibit No. 2

(Filed Nov. 15, 1963)

CALENDAR NO. 421

86TH CONGRESS } SENATE } REPORT
1st Session } } No. 428

AMENDING THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, WITH RESPECT TO PAYMENT OF COMPENSATION WHERE THIRD PERSON IS LIABLE

June 24, 1959.—Ordered to be printed

MR. KENNEDY, from the Committee on Labor and Public Welfare, submitted the following

R E P O R T

[To accompany H.R. 451]

The Committee on Labor and Public Welfare, to whom was referred the bill (H.R. 451) to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes all of the text after the enacting clause and substitutes in lieu thereof a substitute which appears in the reported bill in italic type.

BACKGROUND OF THE BILL

Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and sub-

sistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury.

However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit—those who, in effect, purchase an injured employee's claim for their own monetary advantage.

PURPOSE OF THE BILL

The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in

most modern State workmen's compensation laws. The committee believe that in theory and practice this is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and rights of all who are involved.

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net recovery and incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible.

The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rationale of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that he might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

The bill as amended by the committee provides greater protection to injured workers and corrects defects in existing law. It carefully protects the interests of all who are involved and balances the equities. The bill as amended has the support of both labor and industry and the endorsement of both the Labor Department and the Bureau of the Budget. The views of the executive agencies are expressed in the letters which follow:

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, May 1, 1959.

Hon. LISTER HILL,
*Chairman, Committee on Labor
and Public Welfare,
U.S. Senate, Washington, D.C.*

DEAR SENATOR HILL: This is in further response to your request for a report on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

This bill would amend section 33 of the act, which describes the relative rights of employers and employees under the act when a third party is responsible for an injury which is also compensable under the act. The primary purpose of the bill apparently is to eliminate the present requirement of an immediate election either to take benefits under the act or to pursue a remedy against the third party. Under certain circumstances, it would permit acceptance of compensation benefits and an action by the employee or his representative against the third party. On the other hand, if compensation were accepted without instituting an action against the third party within the period allowed in the bill, the cause of action would be assigned to the carrier after it had given the required notice. Two-thirds of any amount recovered by the carrier in excess of its compensation liability, after the deduction of reasonable

expenses, would be payable to the employee or his eligible survivors.

In general, H.R. 451 appears to follow the pattern of the New York workmen's compensation law and would make significant changes with respect to the rights and liabilities of the parties in interest. This Department would not object in principle to what seems to be the primary purpose of the bill. However, it has several features which we find objectionable, for the reasons described in the enclosed comments on H.R. 451. We are enclosing, as a substitute for H.R. 451, suggested language to remedy these defects. Also enclosed is a Ramseyer of the Department's amendment, and an explanation of this proposal.

Time has not permitted us to determine the views of the Bureau of the Budget on the submission of this report.

Sincerely yours,

JAMES T. O'CONNELL,
Acting Secretary of Labor.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., May 22, 1959.

Hon. LISTER HILL,
*Chairman, Committee on Labor
and Public Welfare,
U.S. Senate, Washington, D.C.*

MY DEAR MR. CHAIRMAN: This is in reply to your letter of April 17, 1959, requesting the views of the Bureau of the Budget on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

As an attachment to its report, forwarded to your committee on May 1, 1959, the Department of Labor has submitted a substitute for H.R. 451 which accomplishes the

major purpose of that bill while correcting certain of its features which were found to be objectionable.

The Bureau of the Budget concurs with the views of the Department of Labor and prefers enactment of the substitute bill proposed by that Department instead of H.R. 451.

Sincerely yours,

(Signed) PHILLIP S. HUGHES,
*Assistant Director for
Legislative Reference.*

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 33 OF LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS AMENDED (44 STAT. 1440)

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer *or a person or persons in his employ* is liable in damages, [he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide,] *he need not elect whether* to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person *unless such person shall commence*

an action against such third person within six months after such award.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person [whether or not the representative has notified the deputy commissioner of his election].

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the [commission] Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, *less one-fifth of such excess which shall belong to the employer.*

(f) If the person entitled to compensation [or the representative elects to recover damages against such third person and notifies the [commission] *secretary* of his election and] institutes proceedings within the period prescribed in section 33(b) [13] the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the [commission] *Secretary* determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (f) [e] only if such compromise is made with his written approval.

[(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.]

(h) [i] Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

“(i) *The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.”*

Exhibit No. 3

(Filed Nov. 15, 1963)

The Honorable Lister Hill
Chairman, Committee on Labor
and Public Welfare
United States Senate
Washington 25, D. C.

Dear Senator Hill:

This is in further response to your request for a report on H.R. 451, a bill "To amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable."

This bill would amend section 33 of the Act, which describes the relative rights of employers and employees under the Act when a third party is responsible for an injury which is also compensable under the Act. The primary purpose of the bill apparently is to eliminate the present requirement of an immediate election either to take benefits under the Act or to pursue a remedy against the third party. Under certain circumstances, it would permit acceptance of compensation benefits and an action by the employee or his representative against the third party. On the other hand, if compensation were accepted without instituting an action against the third party within the period allowed in the bill, the cause of action would be assigned to the carrier after it had given the required notice. Two-thirds of any amount recovered by the carrier in excess of its compensation liability, after the deduction of reasonable expenses, would be payable to the employee or his eligible survivors.

In general, H.R. 451 appears to follow the pattern of the New York Workmen's Compensation Law and would make significant changes with respect to the rights and liabilities of the parties in interest. This Department

would not object in principle to what seems to be the primary purpose of the bill. However, it has several features which we find objectionable, for the reasons described in the enclosed comments on H.R. 451. We are enclosing, as a substitute for H.R. 451, suggested language to remedy these defects. Also enclosed is a Ramseyer of the Department's amendment, and an explanation of this proposal.

Time has not permitted us to determine the views of the Bureau of the Budget on the submission of this report.

Sincerely yours,

/s/ JAMES T. O'CONNELL
Acting Secretary of Labor

Enclosures (4)

COMMENTS OF THE DEPARTMENT OF LABOR ON H.R. 451 A BILL
"TO AMEND THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT, WITH RESPECT TO THE PAYMENT OF
COMPENSATION IN CASES WHERE THIRD PERSONS ARE
LIABLE."

Terminology

H.R. 451 refers to "eligible survivors" rather than to the "person entitled to compensation," the term used in section 33 of the present Act.

In addition, the bill would assign any cause of action against a third person to the "carrier" rather than to the "employer." The section should be assigned to the employer rather than the carrier, and the carrier might be overly subrogated to the employer's rights when the carriers has assumed payment of compensation liability. By speaking of assignment of the cause of action to the carrier, H.R. 451 might be regarded as precluding an assignment to a self-insured employer. However, the report on

the bill by the Committee on Education and Labor of the House of Representatives (Report No. 229, 86th Cong., 1st Sess.) indicates that the assignment of the cause of action is to be to the employer or his insurance carrier. This is, of course, a variance between the two which would invite litigation. Since the employer is primarily liable for payment of workmen's compensation and all liability in the Act is expressed in terms of "employer," H.R. 451 should clearly provide for an assignment of any cause of action against a third party to the employer, with the insurance carrier subrogated to the employer's rights under the proper circumstances. The carrier's rights to subrogation, and not assignment, is presently recognized under the Act in section 33. No reasonable basis appears for modifying the respective rights and liabilities of the carrier and the employer.

Right to expenses in recovering against third persons

Under the present Longshoremen's Act, in order to protect an employee's interest in the recovery in third party suits brought by the employer, the Act requires that the litigation expenses and all other charges of employers, deductible from the recovery, must be approved by the deputy commissioner. H.R. 451 omits this safeguard. It merely provides that the "carrier's" expenses in effecting the recovery must be "necessary and reasonable" and that they may be added to the compensation awarded and medical benefits paid in order to determine whether there is any excess recovery for payment to the employee or his eligible survivors. This appears to be a removal of a safeguard.

Proposed section 33(d) of H.R. 451 would require the carrier to pay any deficiency between the amount of compensation due an employee under the Act and the amount the employee actually collects from any recovery against the third party. This does not take into consideration any expenses and attorneys' fees the employee might incur

X in obtaining the recovery and making the collection, as is done at present. The absence of a specific provision on this subject might raise this question again, perhaps to the detriment of employees.

Exclusiveness of the remedy

Proposed section 33(c) of H.R. 451 purports to make the rights under the Act exclusive in the case of an employee injured or killed by another in the same employ. The effect of the language used is not clear. It would appear that if an employee were injured or killed through the wrong or negligence of a fellow employee and a third person, the third person might be relieved of any joint liability. Further, there seems to be no valid reason for eliminating any right of action against a fellow employee. The employee has given up certain rights and, therefore, there is a basis for making the compensation remedy exclusive as to him. However, the fellow employee has given up nothing in return for his being relieved of liability for his own negligence.

A BILL

To amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That section of the Longshoremen's Harbor Workers' Compensation Act is amended to read as follows:

"COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

"SEC. 33. (a) If an account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he need not

elect whether to receive such compensation or to recover damages against such third person.

“(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

“(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of legal representative of the deceased (hereinafter referred to as “representative”) to recover damages against such third person.

“(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

“(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

“(1) The employer shall retain an amount equal to—

“(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney’s fee as determined by the deputy commissioner);

“(B) the cost of all benefits actually furnished by him to the employee under section 7;

“(C) all amounts paid as compensation;

“(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the secretary and the present value of the cost of all bene-

fits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

"(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-third of such excess which shall belong to the employer.

"(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the secretary determines is payable on account of such injury or death over the amount recovered against such third person.

"(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval.

"(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

Amendment to Section 33 of the Longshoremen's and
Harbor Workers' Compensation Act
Proposed by the Department of Labor

Ramseyer"

Compensation for injuries where third persons are liable

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, [he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide,] *he need not elect whether to receive such compensation or to recover damages against such third person.*

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person *unless such person shall commence an action against such third person within six months after such award.*

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person [whether or not the representative has notified the deputy commissioner of his election].

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damage or may compromise with such third person either without or after instituting such proceeding.

* Existing law omitted is enclosed in black brackets. New matter is printed in italics.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

- (1) The employer shall retain an amount equal to—
 - (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);
 - (B) the cost of all benefits actually furnished by him to the employee under section 7;
 - (C) all amounts paid as compensation;
 - (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the [commission] *Secretary*, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and
- (2) the employer shall pay any excess to the person entitled to compensation or to the representative, *less one-fifth of such excess which shall belong to the employer.*

(f) If the person entitled to compensation [or the representative elects to recover damages against such third person and notifies the [commission] *Secretary* of his election and] institutes proceedings within the period pre-

scribed in section 33(b) [13] the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the [commission] *Secretary* determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (f) [e] only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(h)[i] Where the employer is insured and the insurance carrier shall be subrogated to all the rights of the employer under this section.

**EXPLANATION OF DEPARTMENT OF LABOR PROPOSAL TO SECTION
33 OF THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT.**

The purpose of this proposed amendment, like that of proposed legislation now pending in Congress, is to amend section 33 of the Longshoremen's and Harbor Workers' Compensation Act to permit an insured employee, or his dependents in case of death from injury, to pursue a third party remedy while receiving compensation, under certain conditions. That purpose may be accomplished by amending the existing provisions which, in general, have operated satisfactorily over the years. In addition, re-enacting the section with language changes, rather than enacting an entirely new section, would permit the continuance of the current judicial construction of much of the section.

Under subsection (a) of section 33, a person entitled to compensation under the Act on account of disability or death would not be required to elect between compensation and a suit against a third person for damages when he determined that a person other than the employer may be liable. Therefore, the person entitled to compensation could pursue both remedies concurrently.

Section 33(b) provides that unless the person entitled to compensation brings an action for damages against the third person within six months after acceptance of compensation under an award in a compensation order filed by the deputy commissioner, the acceptance shall operate as an assignment of the cause of action to the employer. In other words, if the party entitled to compensation does not bring a third party action within the stipulated time, the employer may seek recovery.

Section 33(c) provides that when an employer pays compensation into the fund established in section 44 (a fixed sum for the death of an employee of that employer when the deputy commissioner determines that there is no person entitled to compensation under the Act), such payment shall operate as an assignment to the employer of the cause of action against a third person. Thus, a distinction is made between a person entitled to compensation, and a legal representative of the deceased who does not have the privilege of pursuing concurrent remedies.

Section 33(d) provides that when the cause of action is assigned to an employer, he may bring an action for damages against the third person, or compromise the claim before or after instituting proceedings.

Under subsection (e) of section 33, a sum recovered by an employer as a result of a damage suit or a compromise would be shared by the employer, who would retain one-fifth, and the person entitled to compensation, who would receive four-fifths, after deductions for (1) the expenses incurred by the employer with respect to the proceedings

or compromise, including a reasonable attorney's fee as determined by the deputy commissioner; (2) benefits furnished under section 7; (3) compensation paid; and (4) the present value of amounts thereafter payable as compensation, computed in accordance with a schedule prepared by the commission, as well as the present value of future section 7 benefits as estimated by the deputy commissioner. The amounts so computed and estimated would be retained by the employer as a trust fund from which such sums would be paid as they become due. Any sum finally remaining in the fund would be paid to the person entitled to compensation or the representative.

Under existing law, the employer is entitled to retain, from the sum received in a third party action, only an amount equal to the disbursements which he has made or expects to make. Any amount recovered in excess of disbursements is paid to the person entitled to compensation. This, of course, would not stimulate the employer to recover more than he is entitled to retain. However, it would appear that giving the employer a share in the recovery beyond his disbursements would be an inducement to him not to compromise the third party claim for such disbursements only. Thus, the amendment would benefit the employee who would share in any additional amount recovered.

Section 33(f) provides that if the person entitled to compensation institutes proceedings within the requisite six months, the employer is required to pay as compensation a sum equal to the excess of the amount payable on account of the injury or death, as determined by the Secretary, over the amount recovered from the third person.

*right
anyway
perhaps*

There is no necessity for a provision giving the employer a lien on the employee's third party recovery for the compensation and benefits paid by the employer, inasmuch as the courts have construed the present section 33 as providing such lien. In addition, as a result of judicial construc-

tion of the existing section, the employee is entitled to deduct his expenses incurred in third party proceedings.

Section 33(g) provides that when the person entitled to compensation or the representative compromises with the third party for an amount less than the compensation to which the person would be entitled, the employer is liable for the additional compensation only if the compromise is made with his written approval. The existing subsection (g) of section 33 makes reference to subsection (e) rather than subsection (f) as provided in the amendment. This change is merely a correction of a patent error which appears in the existing provision.

The original section 33(h) is omitted because of the elimination of the election requirement. The amended subsection (h), which is the original subsection (i) as redesignated, provides that an insurance carrier shall be subrogated to all rights of the employer under section 33 when the employer is insured and the carrier has assumed the payment of the compensation.

(Filed Nov. 21, 1963)

Order

Upon consideration of the motions of the defendants Potomac Electric Power Company and the District of Columbia to dismiss the amended complaint filed herein, and of the opposition filed by the plaintiff thereto, and the supplemental memorandum filed by defendant Potomac Electric Power Company in support thereof, and upon further consideration of the arguments of counsel in open court, and it appearing to the Court that by the consent of counsel the motions should be treated as motions for summary judgment, and it further appearing to the Court that said motions should be denied; and as the Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference

of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation, it is by the Court this 21st day of November, 1963.

ORDERED that the motions of the defendants Potomac Electric Power Company and the District of Columbia to dismiss, being treated as motions for summary judgment, be and the same are hereby denied, and it is further

ORDERED that said defendants are hereby granted leave to apply to the United States Court of Appeals for the District of Columbia Circuit for the allowance of an interlocutory appeal pursuant to the provisions of 28 U.S.C. § 1292(b).

/s/ ALEXANDER HOLTZOFF
Judge

This is a revised transcript of an oral opinion delivered from the bench at the close of the argument on Nov. 18, 1963.

/s/ ALEXANDER HOLTZOFF
Judge
12/5/63

(Filed Dec. 5, 1963)

Opinion

I. Irwin Bolotin, of Washington, D. C., for the plaintiff.

Stephen A. Trimble, of Washington, D. C., for the defendant Potomac Electric Power Company.

James M. Cashman, of Washington, D. C., Assistant Corporation Counsel, for the defendant District of Columbia.

This case presents a question of novel impression in this jurisdiction concerning the rights of an injured employee to enforce a cause of action for negligence against

a third party in addition to accepting workmen's compensation under the Longshoremen's and Harbor Workers' Compensation Act, which constitutes the Workmen's Compensation Act for the District of Columbia. In order to present the question it would be helpful first to summarize briefly the chronology of the proceedings in this case.

The plaintiff, who was the injured employee, was injured on August 1, 1960. A compensation award under the Longshoremen's and Harbor Workers' Compensation Act was made in his favor on March 9, 1962. In the meantime, on January 30, 1962 he had brought a third party action against one Ansel P. Kelley, seeking to recover damages for negligence on account of the same injury. On July 17, 1963, he filed an amended complaint adding the Potomac Electric Power Company as an additional defendant against whom the so-called third party claim was made. Naturally, when a new party is brought in, the amendment does not relate back to the date of the institution of the action insofar as the new party is concerned and the rights and liabilities of the Potomac Electric Power Company must be determined as though an action was brought against it on the date of the filing of the amended complaint, July 17, 1963.

The defendant Power Company moves to dismiss the action on the ground that the plaintiff employee is not the real party in interest in that his cause of action had been assigned by operation of law to his employer. Both parties agree that this motion should be treated as a motion for summary judgment.

Taking up the pertinent provisions of the statute, prior to 1959 the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933, accorded to an injured employee, who claimed that some person other than his employer was liable in damages for his injury, a right of election either to receive compensation under the Act or to recover damages against the third person. Acceptance

of compensation under a compensation order operated as an assignment to the employer of all rights to recover damages against a third person. This section was amended, however, on August 18, 1959. The purpose and effect of the amendment was to liberate the employee from the dilemma in which he had either to elect to accept compensation or elect to sue the third party. He was permitted to do both under this amendment.

As amended, subsection (a) of Section 933, to which reference has been made, reads as follows:

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Subsection (b) provides that an acceptance of a compensation award shall operate as an assignment to the employer of all rights of the employee to recover damages against such third person, unless such person shall commence an action against such third person within six months after such award. In other words, the injured employee may accept compensation and still bring an action against a third party within six months after the compensation award. If he fails to bring the action, then his rights against a third party are assigned by operation of law at the end of that period to his employer. In this instance the third party action was brought by the employee long after the expiration of the six months period and shortly before the expiration of the statute of limitations against bringing of the action.

If the statute stopped at this point the Court would agree with counsel for the defendant that the plaintiff has lost all his rights to bring suit by not doing so within the

six months period. The statute, however, proceeds, in subsection (d), as follows:

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

In other words, subsection (d) places a limitation on the assignment. It is not an assignment for all purposes. It confers on the employer the right to institute and maintain proceedings or to compromise the claim with such third person. It does not authorize him to do nothing about it. The statute unfortunately does not indicate what should happen if the employer does nothing about the matter. It is what might be called a *casus omissus*.

Now we proceed to the following subsection, subsection (e). That section provides, in effect, that if the employer recovers any damages whether or not as a result of a compromise he shall first reimburse himself for all expenses, plus one-fifth of the excess, which presumably is compensation for his trouble, and then pay the balance to the employee. In other words, the employee retains what might be called an equitable right in the claim because he is interested in the outcome. His position is analogous to that of a *cestui que* trust, and the position of the employer, who is the assignee of the legal title to the claim, is analogous to that of a trustee, who, however, is empowered to reimbursed himself for his expenses and receive compensation for his trouble.

To go back to subsection (d) that provision indicates that the assignment to the employer is not an absolute or complete assignment but confers on the employer certain limited powers. It does not confer upon him the power to abandon the action. The difficulty, of course, is that Congress apparently did not foresee the possibility of an abandonment of the action and, not anticipating such a contingency, has made no provision for it. It is necessary,

therefore, to endeavor to interpret Congressional intent and the purpose of the statute.

Workmen's compensation acts are to be liberally construed. The Supreme Court many years ago in the case of *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, made the following statement:

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

There are many other cases that could be cited along the same line.

The Court reaches the conclusion that Congress could not have intended that the employer by his inaction should be permitted to destroy the rights of the injured employee against a third party, in view of the fact that the employee is accorded by this statute an interest in the recovery which may, at times, be much greater than the interest of the employer, and in view of the further fact that there are limitations on the employer's assignment expressly provided in the statute.

While the question is not free from doubt, and the Court was indeed impressed by the able argument of counsel for the defendant, the conclusion is nevertheless reached that if the employer, after the claim is assigned to him by operation of law, fails within a reasonable time either to institute suit or to secure a compromise of the claim, the injured employee may, within the period limited by

the applicable statute of limitations, bring suit in his own name, and, therefore, he has the capacity to sue.

The Court has considered the case decided by the Court of Appeals of the State of New York on which counsel for the defendant relies, *Taylor v. New York Central Railroad Co.*, 294 N.Y. 397. That case does seem to sustain the position of the defendant in this case, and under ordinary circumstances New York decisions construing its Workmen's Compensation Act would be very persuasive in view of the fact that the New York Act was one of the first statutes of its kind. An analysis of the New York statute, however, shows that the applicable section of the New York Workmen's Compensation Act, Section 29, differs substantially from Section 933 of the Federal Act, as amended, and, therefore, the *Taylor* case cannot be deemed an authority. Specifically, there is no provision in the New York Act paralleling subsection (d) of the Federal Act, and it is subsection (d) that places limitations on the assignment made to the employer. In fact, the principle of statutory construction that enumerating some matters and failing to mention others is equivalent to excluding them, would seem to exclude the right of the employer to do nothing about the claim.

The Court is not unmindful of the fact that there are expressions which would lead to a contrary conclusion in a decision of the United States District Court for the Eastern District of Michigan in *Alexander v. Creel*, 54 F. Supp. 652. With due deference to the learned Judge who wrote that opinion, this Court takes a different view of the matter.

Accordingly, the defendant's motion to dismiss the complaint, construed as a motion for summary judgment, is denied.

ALEXANDER HOLTZOFF
United States District Judge.

November 18, 1963.

(Filed Jan. 14, 1964)

Notice of Appeal

Notice is hereby given this 14th day of January, 1964, that the defendant Potomac Electric Power Company hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of November, 1963, in favor of the plaintiff against said Potomac Electric Power Company.

HAMILTON AND HAMILTON

By:

Attorney for
Potomac Electric Power
Company
916 Union Trust Building
Washington, D. C. 20005

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,252

POTOMAC ELECTRIC POWER COMPANY,

Appellant,

v.

JOHN F. WYNN, JR.,

Appellee.

Interlocutory Appeal From an Order of the
United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 19 1964

Nathan J. Paulson
CLERK

PHILIP J. LESSER
I. IRWIN BOLOTIN
917 15th Street, N.W.
Washington, D. C. 20005

Attorneys for Appellee

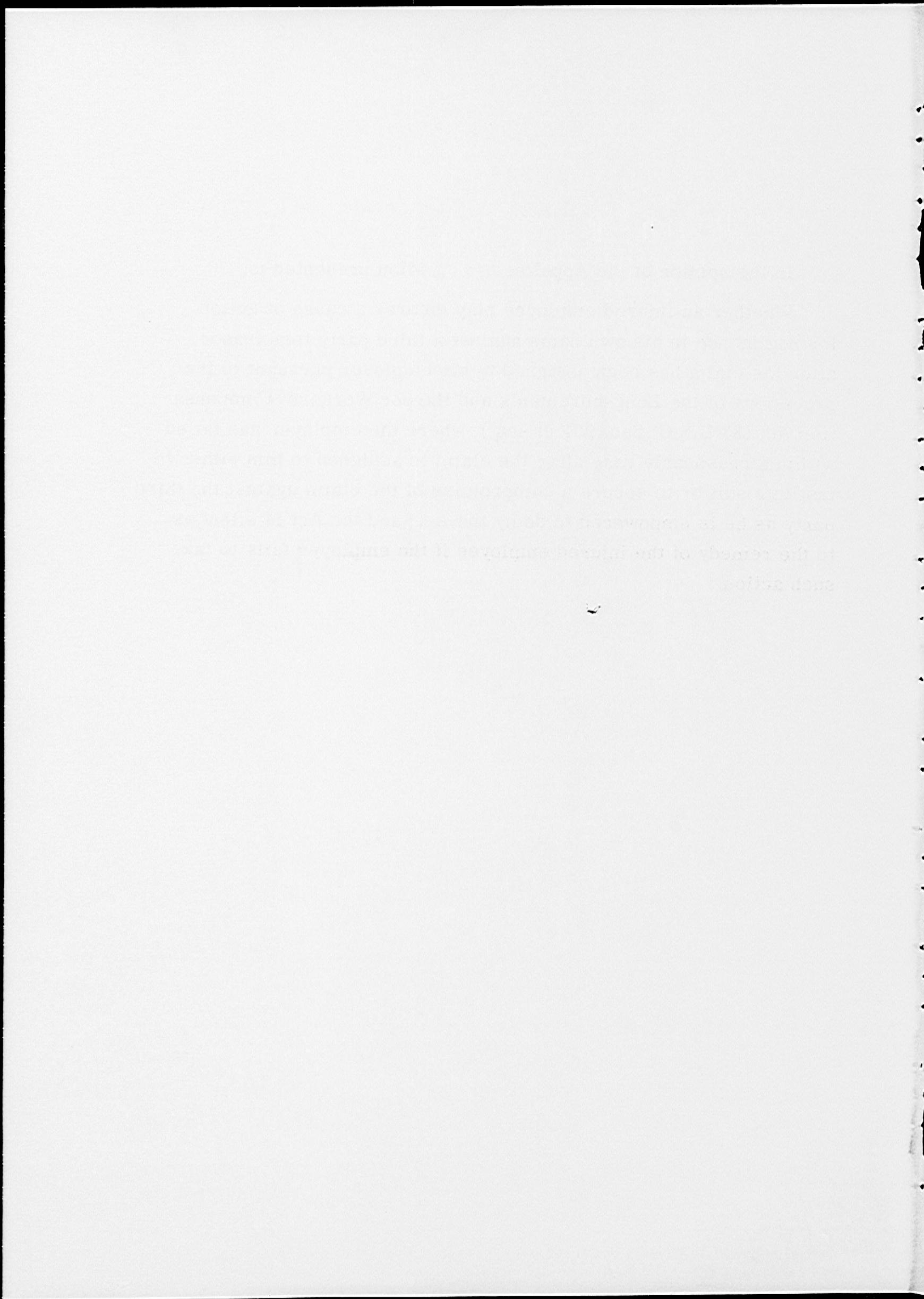


(i)

APPELLEE'S STATEMENT OF QUESTION PRESENTED

In the opinion of the Appellee the question presented is:

Whether an injured employee may enforce a cause of action for negligence in his own name against a third party tort-feasor, after his claim has been assigned to his employer pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Sec. 901 et seq.), where the employer has failed within a reasonable time after the claim is assigned to him either to institute suit or to secure a compromise of the claim against the third party as he is empowered to do by the Act, and the Act is silent as to the remedy of the injured employee if the employer fails to take such action.



(iii)

I N D E X

	<u>Page</u>
COUNTERSTATEMENT OF THE CASE	1
STATUTE INVOLVED	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	6

CITATIONS

Cases:

Moore v. Hechinger, 75 U.S. App. D.C. 391, 127 F.2d 746 (1942)	6
Taylor v. New York Central, 62 N.E. 2d 777, 294 N.Y. 397 (1945), cert. denied 326 U.S. 786	6

Statutes:

Title 33 U.S.C. Sec. 933	1, 2-4
--------------------------------	--------



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,252

POTOMAC ELECTRIC POWER COMPANY,

Appellant,

v.

JOHN F. WYNN, JR.,

Appellee.

Interlocutory Appeal From an Order of the
United States District Court for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellee John F. Wynn, Jr. while employed as a lifeguard at the Banneker Swimming Pool in the District of Columbia sustained an injury through electric shock in the pool on August 1, 1960. He subsequently applied for and received a compensation award pursuant to the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. Sec. 901, et seq. (as amended August 18, 1959). The Compensation Order was entered by the Deputy Commissioner on March 9, 1962 (J.A. 44).

The Compensation Act, Title 33 U.S.C. Sec. 933(b) provides, in effect, that acceptance of compensation by an injured employee under an award shall operate as an assignment to the employer of all right of the injured employee to recover damages against a third party tortfeasor unless such injured employee shall commence an action against such third party within six months after such award (J.A. 37).

On January 30, 1962 appellee filed a negligence action against one Ansel P. Kelley, an independent electrical contractor who had maintained the electrical system of said pool (J.A. 2).

Counsel for appellee subsequent to the operation of the assignment of the claim learned that two other parties namely, the appellant herein and the District of Columbia were also liable to the appellee for the injuries sustained by him. After waiting in excess of 35 months after the date of the injury, and the employer having failed to take action against the present appellant and the District of Columbia, the appellee filed an Amended Complaint on July 17, 1963 naming for the first time as co-defendants in his pending lawsuit, the appellant Potomac Electric Power Company and also the District of Columbia who is not a party to this appeal.

The appellant and the District of Columbia filed Motions to Dismiss the Amended Complaint which were argued and denied by Judge Alexander Holtzoff. The written opinion of Judge Holtzoff is contained in the Joint Appendix at pages 43 to 48.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U.S.C. Sec. 933) are:

- (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
- (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall com-

mence an action against such third person within six months after such award.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to —

- (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);
- (B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
- (C) all amounts paid as compensation;
- (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

- (2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

SUMMARY OF ARGUMENT

In view of the failure of the employer to take the action specified in Section 933 (d) of the Workmen's Compensation Act against the appellant and the District of Columbia it was entirely proper and essential for the appellee as a real party in interest to bring in as additional defendants the Potomac Electric Power Company and District of Columbia, in order to protect his rights. These additional parties were made co-defendants just before the applicable three year statute of limitations on August 1, 1963 would have barred any legal proceedings against these defendants. It was therefore necessary for the appellee to take such action in order to protect his rights herein.

ARGUMENT

We contend that even though the Compensation Act assigns the appellee's right to recover damages from the third party tort-feasor to his employer, nevertheless, the appellee continues as the real party in interest within the meaning of both the Workmen's Compensation Act and Rule 17 (a) of the Federal Rules of Civil Procedure. The Compensation Act, although specifying in subsection (b) that the acceptance of compensation under an award operates as an assignment to the employer of all right of the injured employee to recover damages, nevertheless, subsection (e) provides in effect that the injured employee still retains an interest in the assigned claim. The Compensation Act empowers the employer to either institute proceedings for the recovery of damages or to compromise with the third party either without or after instituting legal proceedings. The assignment to the employer is thus not an absolute assignment since it confers on the employer limited powers both in respect to the action to

be taken by him and in the distribution of the funds so obtained by him. The employer is thus placed in the position of a trustee, with a fixed obligation to the injured employee. This assignment is not an absolute one but is limited in the manner specified in subsections (d) and (e) of the Act. The employer is not permitted by the Act to abandon the cause of action. Unfortunately Congress did not specify what should be done in the event that the employer did nothing about the cause of action but elected to abandon the same. The effect of such an abandonment would, of course, be harmful to the injured employee. As was pointed out by Judge Holtzoff, the failure of Congress to specify what was to be done in the event the employer failed to take the action provided for by subsection (d) might be called a casus omissus.

It is fundamental that the Workmen's Compensation Act must be liberally construed. It is to be construed so as to carry out the intent of the Act to the benefit of the injured employee. As Judge Holtzoff pointed out,

"Congress could not have intended that the employer by his inaction should be permitted to destroy the rights of the injured employee against a third party, in view of the fact that the employee is accorded by this statute an interest in the recovery which may, at times, be much greater than the interest of the employer, and in view of the further fact that there are limitations on the employer's assignment expressly provided in the statute."

It was imperative that the appellee file his Amended Complaint on July 17, 1963 bringing in the appellant and the District of Columbia as additional defendants since the employer had failed to take any action or seek any compromise from these parties. This was necessary in order to stop the running of the applicable three-year statute of limitation [D. C. Code, Title 12, Section 201 (1961 edition)].

To permit the appellant to prevail in this case would have the effect of shortening the three-year statute of limitations to that of a six months statute of limitations in so far as appellee is concerned. We submit that Congress did not intend to so shorten the time within which an injured employee could maintain a common law third party action.

It is interesting to note that the employer has not as of this date filed a common law third party suit against this appellant and the District of Columbia and has not attempted to effect a compromise of this claim against these parties. The right of subrogation to the employer is not affected by permitting the appellee to maintain this cause of action against the appellant and the District of Columbia. On the other hand, to permit the appellant and the District of Columbia to be relieved of liability altogether because of this apparent inadvertent omission by Congress would be unfair to appellee and a miscarriage of justice.

We submit that the case of Moore v. Hechinger, 75 U.S. App. D.C. 391, 127 F.2d 746 relied upon by the appellant is not in point, since that case was decided before the amendment to the Compensation Act and did not involve the questions of an abandonment by the employer or of his limited assignment. It will also be observed that the case of Taylor v. New York Central, 62 N.E. 2d 777, 294 N.Y. 997, decided under the New York Workmen's Compensation Act is not applicable since the New York Statute differs substantially from the Longshoremen's and Harbor Workers' Compensation Act, particularly since the New York Act has no section which is analogous to Subsection(d) of the Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION

In view of the above, it is respectfully submitted that the action of the court below should be affirmed.

To dismiss this suit against appellant and the District of Columbia could only benefit the third party tort-feasor and would defeat the rights of the appellee who is the beneficiary of any action which his employer should have taken but instead saw fit to abandon.

Respectfully submitted,

PHILIP J. LESSER
I. IRWIN BOLOTIN
917 - 15th Street, N.W.
Washington 5, D. C.
Attorneys for Appellee

THIEL PRESS
WASHINGTON, D.C.
EX 3-0625 3-7217